Supreme Court, U.S.
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No. 95-1159

In The

Supreme Court of the United States

October Term, 1995

NANSAY HAWAII, INC.,

Petitioner,

v.

PUBLIC ACCESS SHORELINE HAWAII,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Hawai'i

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Pursuant to Supreme Court Rule 15.6, the Petitioner, Nansay Hawaii, Inc., respectfully submits this Reply to Brief in Opposition.

ARGUMENT

THE HAWAI'I SUPREME COURT'S DECISION IS FINAL AND RIPE FOR REVIEW

1. Respondent, Public Access Shoreline Hawaii (PASH), suggests in its Brief in Opposition that Petitioner's takings claim is unripe. PASH deliberately obscures the point that Nansay is not raising in this Petition a regulatory takings claim. The precedent that PASH relies upon for its assertion is thus inapposite. The only case that PASH cites, *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), concerned a regulatory taking, not a physical occupation of property. See id. at 186.

As Nansay carefully pointed out in its Petition, at 25 n.13, the injury that it has sustained as a consequence of the Hawai'i Supreme Court's decision is not that its planned development will be the subject of unconstitutional conditions. Rather, the injury Nansay complains of, and the one the Hawai'i Supreme Court itself acknowledged as imposing in its opinion, is that Nansay will now suffer the physical intrusion onto its property of a vastly expanded and inchoate class of native Hawaiians, individuals who can assert enlarged and indefinite gathering and traditional rights. *PASH*, 903 P.2d at 1260; Pet. 29a-30a. Such an encroachment had not been previously

sanctioned by Hawaiian law. Irrespective of whether Nansay is ultimately precluded from developing its property, it has suffered the real and present injury of having to submit to the physical occupation of its land.

The Hawaii Supreme Court's decision also changed the essential nature of gathering rights to give gatherers the right to restrict or prevent a land owner from developing land where gathering takes place. Previous opinions of the Hawaii Supreme Court stated clearly and unequivocally that gathering rights "do not prevent owners from developing land." *Kalipi v. Hawaiian Trust Co.*, 66 Haw. 1, 656 P.2d 745, 749 n.2 (1982). Thus, the Court's declaration of Hawaii property law is final and has authorized invasion and occupation of Nansay's property by more people who hold broader rights than previously established.

2. Likewise, PASH's assertion that the Hawai'i Supreme Court's decision is not final under 28 U.S.C. 1257(a), is unavailing. PASH's jurisdictional point would only be well-taken if Nansay were raising a regulatory takings claim, which it is not. Nevertheless, PASH insists that because the Hawai'i Supreme Court remanded the case for further proceedings, this is a conclusive bar to finality.

The finality requirement has always been given a "practical rather than a technical construction" by this Court. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949); see also *Bradley v. School Bd. of City of Richmond*, 416 U.S. 696, 722-23 n.28 (1974). Moreover, this case arises in a similar posture as *North Dakota State Bd. of Pharmacy v. Snyder's Drugs Stores, Inc.*, 414 U.S. 156 (1973).

There a state court had passed on the issue whether certain property rights were protected under the federal constitution, and then remanded the case for further proceedings to grant or deny a permit on the assumption that that decision, and any subsequent appeal, could only be challenged on state law grounds, and that the federal issue was foreclosed. This Court held that the judgment on the federal constitutional grounds was final for purposes of review under 1257(a). See id. at 159-64; see also *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479-85 (1975).

Likewise, the PASH decision is conclusive and final as to the Hawaiian courts' rejection of Nansay's claim that granting a broad, customary right to an indeterminate class of native Hawaiians imposes an impermissible servitude on land, in violation of the Fifth and Fourteenth Amendments. The Hawai'i Supreme Court's own, concluding language in its opinion rings with finality on this point: "[T]his decision does not effect a judicial taking of Nansay's private property because it is grounded in preexisting principles of State property law." 903 P.2d at 1273, Pet. 63a. It is manifest that, after this final decision, Nansay will not be permitted to renew its federal constitutional claims for deprivations of due process[1] or a

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[1] In their Brief in Opposition, PASH asserts that Petitioner Nansay Hawaii, Inc., failed to raise the issue of a due process violation before the Hawaii Appellate Court. See Op. Cert. at 4, n.3. This is clearly and obviously incorrect. Petitioner raised and argued the due process issue in its briefs before the Hawaii Supreme Court, cited those arguments in the Petition for a Writ of Certiorari to this Court (p. 10) and included relevant portions of the appellate briefs in the Petition Appendix (see, e.g. 159a-161a).

physical taking arising from this refashioning of state property law. The issue of finality should not bar this Court's granting the Petition, if it is otherwise disposed to do so.

Respectfully submitted,

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